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No. 748

In the Supreme Court of the United States

OCTOBER TERM, 1932

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. CAMPBELL, J. R. CAMPBELL, C. W. AMSLER, AND HENRY AMSLER, TRADING AS THE BIRCH VALLEY LUMBER COMPANY, A PARTNERSHIP, RESPONDENTS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF INTERSTATE COMMERCE COMMISSION

DANIEL W. KNOWLTON,
EDWARD M. REIDY,
For Interstate Commerce Commission.

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INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA ON THE RELATION OF J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a partnership, respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF INTERSTATE COMMERCE COMMISSION

OPINIONS

The memorandum opinion of the Supreme Court of the District of Columbia denying the petition for writ of mandamus stated that this case was controlled by *Donner Steel Company* v. *Interstate Commerce Commission,* 52 Appeals D.C. 221, and *Interstate Commerce Commission* v. *United States ex rel. Capital Grain & Feed Company,* 59 Appeals D.C. 118 (R. 50). The opinion of the

Court of Appeals of the District, reversing that of the Supreme Court, has not been published, but will be found on pages 53–59 of the record. The Commission's report is entitled Docket No. 19191, *Birch Valley Lumber Company* v. *Strouds Creek & Muddlety Railroad Company et al.*, 144 I.C.C. 419, and appears at pages 28–37 of the record.

JURISDICTION

By petition filed June 20, 1932, respondent sought from the Supreme Court of the District of Columbia a writ of mandamus compelling petitioner, Interstate Commerce Commission, to determine the amount of damages sustained by respondent in consequence of certain violations of the Interstate Commerce Act. The judgment of the Supreme Court of the District of Columbia dismissing said petition was entered on October 4, 1932 (R. 50), and upon appeal this judgment was reversed by the Court of Appeals of the District of Columbia (R. 59).

The Commission filed its petition for writ of certiorari under subsection (a) of Section 240 of the Judicial Code, as amended and reenacted by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938) and said petition was granted by this Court March 20, 1933 (R. 63).

QUESTION

The Commission, having taken jurisdiction of a complaint against rates, found that, while said rates were not unreasonable, they caused undue

prejudice and preference, warranting issuance of an order for removal thereof; but further found that the record would not support an award of damages based on the undue prejudice. The ultimate question here raised is whether the Court of Appeals of the District of Columbia did not err in concluding that mandamus would lie to compel the Commission to reach a different judgment and issue an award of damages. A subordinate question is whether said court did not err in holding that certain preliminary statements of fact by the Commission were conclusive on the question of damage, leaving nothing more to be done than to multiply "the number of cars by the ascertained overpayment per car", and, therefore, rendering the Commission's determination that the record would not support an award of damages a conclusion contrary to its own findings.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act (24 Stat. 379), as amended by the Transportation Act of 1920 (41 Stat. 456) provide:

> Section 1 (5): All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibted and declared to be unlawful: * * *.

Section 3 (1): That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 6 (1): That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of

freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Section 8: That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every

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case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9: That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Section 13 (1): That any person, firm, corporation, company, or association, or any

mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15 (1): That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint

whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission

other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 16 (1): That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

STATEMENT OF THE CASE

Proceedings before the Commission

The controversy had its inception in a complaint filed on January 11, 1927, by the Birch Valley Lumber Company, designated Docket No. 19191, wherein it alleged that the rates charged for transporting lumber and other forest products from Tioga, W.Va., to various destinations in the United States and eastern Canada, including eastern Trunk Line, New England and Central Territories (R. 18), were and are unreasonable, and unduly prejudicial and preferential, in violation of Sections 1 and 3 of the Interstate Commerce Act (R. 29). In the hearings conducted by the Commission following the filing of the complaint and

the answers of the railroad companies thereto, it was developed, among other things: That the Strouds Creek & Muddlety Railroad Company, hereinafter called the S.C. & M., is a short line railroad serving Tioga and Delphi, W.Va., where the plants of the Birch Valley Lumber Company and the Delphi Lumber Company, respectively, are located (R. 30); that Tioga is 7.1 miles and Delphi 9.5 miles from Allingdale, W.Va., the junction point of the S.C. & M. with the Baltimore & Ohio Railroad, hereinafter called the B. & O.; that for rate-making purposes, producing territory tributary to the B. & O. in West Virginia, Pennsylvania, and Maryland was divided into several groups, from each of which so-called district or group rates were maintained from all stations on the main and branch lines of the B. & O., whereas (with some exceptions in certain of the groups (R. 32)) rates from origins on independent short lines were made on a combination of the locals to the junction points plus the group rate beyond; that Allingdale, said junction of the S.C. & M. with the B. & O., was, for example, located in what is called the Richwood Group as to traffic destined to trunk-line territory, and in Group 9 as to traffic destined to central territory; that the S.C. & M., for performing the haul from Tioga or Delphi to Allingdale, received $15 per car which was prepaid by the shipper and was in addition to the group rate, applicable from Allingdale, to whatever might be the destination beyond;

that complainant's lumber was sold in competition with that produced throughout the country and especially that produced in the same general territory, its principal competitors being mills located at Gauley Mills, Fenwick, Midvale, Suncrest, and Pickens, W.Va., which were stations on the B. & O. from which the group rates applied (R. 30).

The complainant lumber company asked that the carriers be required to establish joint rates from Tioga and Delphi not to exceed the group basis, asserting that because of competition it was forced to absorb the $15 charge of the S.C. & M., by reason of which fact it could not compete on as favorable terms as its competitors. Reparation on past shipments was also sought (R. 29). Said company's prices are quoted f.o.b. Allingdale, W.Va. Its markets are various points in Canada, Kentucky, Illinois, Michigan, Ohio, Pennsylvania, New York, New Jersey, Maryland, and the New England States (R. 29, 18). During the last half of the year 1926, a total of 565 cars moved from stations on the S.C. & M., 197 whereof were destined to points in Pennsylvania, 128 to West Virginia, 86 to Ohio, 71 to Kentucky, 26 to New York and the remainder to various other States. (R. 29).

At the hearings the lumber company introduced, among other things, exhibits comparing the rates from said stations on the S.C. & M., and the earnings per car, with those from various points in the same general territory, including points in West

Virginia on the West Virginia Northern and points in Maryland on the Cumberland & Pennsylvania and on the Western Maryland, at which competing mills were located (R. 19) and from which group or district rates applied, the same in level as the rates applicable from junction points of said roads with the B. & O. (R. 31). The Commission discusses said rate comparisons in its report and sets forth illustrative examples thereof in an appendix (R. 36, 37). The report further discusses exhibits of the B. & O., comparing the group rates from Allingdale with those applicable from the various groups surrounding said point, and also decisions of the Commission pointed to by the B. & O. in support of the reasonableness of the rates involved and of its policy not to extend to points on connecting lines the group or junction-point rate except when compelled to do so by competition.

On the question of said policy of the B. & O. the Commission considered that its decision in the so-called *Swift Lumber Company case,* 61 I.C.C. 485, was governing. In that case there was a large area in Mississippi from all stations within which on the main or branch lines of the Illinois Central rates on lumber moving to northern markets were the same, whereas from stations on independent connecting lines, including Knoxo on the Fernwood & Gulf, rates were higher, they being, as in the instant case, made on a combination of the locals to the junction points plus the group rate beyond. On

findings that the rates from Knoxo were not unreasonable, but that they subjected the Swift Lumber Company, located at Knoxo, to undue prejudice, the Commission ordered the carriers to desist from charging rates higher from Knoxo than from the other points in the territory; and its said order was upheld by this Court in *United States* v. *Illinois Cent. R. R.*, 263 U.S. 515.

The Commission's report in the instant case comments on the *Swift Lumber Company case,* as follows:

> In that case as here it was the policy of the principal trunk-line defendant to not extend the junction-point or group rates to points on short-line connections. The Illinois Central system had eight such connections, and none of them were accorded the blanket rates. Here also the B. & O. has not extended the group rates to points on other short lines in the same group, but in other near-by groups taking slightly lower rates the junction-point or group rates are applied from points on certain short lines and a trunk-line connection of the B. & O. The latter contends that this is due to competition, although it is the only carrier which connects with one of the short lines. A similar contention was made by the Illinois Central with respect to its participation in joint rates from points on certain short-line connections of other carriers. The Swift Lumber Company's competition in that case was

> not shown to be with any particular mills and was not confined to those in the blanket territory. In the present case complainant's competition is mainly with mills in the same general territory, which includes the other groups where the junction-point or group rates apply from points on certain short-line connections of the B. & O. As in the case cited, mills on the other short lines are not shown to fix the prices at which complainant sells its lumber, but there appears to be no question that complainant and intervener are forced to base their prices on the group rates and absorb the charges of the S.C. & M. (R. 35).

After mentioning the fact that the decision in the *Swift Lumber case* had been sustained by this Court, as aforesaid, and that it had been since generally followed in many cases, the report concludes with the following:

> We find that the rates assailed, in so far as they apply within the United States, were not and are not unreasonable but were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, W.Va. ***The record will not support an award of reparation based on the undue prejudice found to exist.*** (Italics supplied.) (R. 36.)

A further similarity between the instant case and the *Swift Lumber Company case, supra,* is that in the latter case, too, reparation was denied.

This decision was by a division of the Commission, consisting of three members, one of whom could not agree with the majority that there was any basis for a finding of undue prejudice[1] (R. 36).

By its order entered on the same day as its report, May 29, 1928, the Commission directed the carrier defendants to cease and desist, on or before August 15, 1928, and thereafter to abstain from practicing the undue preference and prejudice found to exist, and to establish, maintain, and apply regulations and practices which would prevent and avoid such undue prejudice and preference (R. 37–42). Other than the S.C. & M., the railroad defendants were dissatisfied with the finding and order of the Commission, and filed a petition for reconsideration and reargument on July 5, 1928. Pending action on this petition the Commission suspended the effective date of its order indefinitely. The petition for reconsideration was denied on November 1, 1928, and the order became effec-

[1] Section 17 (2) of the Interstate Commerce Act authorizes the Commission to form divisions, of not less than three members each, and paragraph (4) of that section provides that a determination of a division of the Commission has the same force and effect as a decision of the full Commission, reserving the right in the parties conferred by Section 16 (a), to have the decision reheard by the entire Commission if good cause appears therefor.

tive on January 14, 1929 (R. 8). On July 30, 1930, more than two years after the Commission's decision, the Birch Valley Lumber Company filed a petition seeking to have the entire Commission rehear the case, a reply in opposition thereto was filed by the carrier defendants other than the S.C. & M., and on February 2, 1931, the petition was denied (R. 9).

Proceedings in the lower courts

Between the date of the denial of its petition for rehearing by the Commission on February 2, 1931, and June 20, 1932, the lumber company took no action towards the correction of the Commission's alleged error. On the latter date it filed its petition for a writ of mandamus in the Supreme Court of the District of Columbia, praying:

> * * * that this honorable court issue its writ of mandamus commanding the respondent Commission to determine the full amount of damages sustained by the relators in consequence of the aforesaid violations of the Interstate Commerce Act as found by the Commission and described in Paragraph XIII hereof, the damage sustained by the relators being measured by such amount as the payments of charges to the said carriers on shipments by The Birch Valley Lumber Company, a corporation, and the relators, from Tioga, West Virginia, on and after the 11th day of January, 1925, exceeded the rates contemporaneously maintained on like

> traffic from the group which included Allingdale, West Virginia, * * *. (R. 10).

The case was submitted to the Supreme Court of the District of Columbia upon the petition for a writ of mandamus and exhibits thereto attached, the rule to show cause, the answer of the Interstate Commerce Commission, and the demurrer to said answer. On October 4, 1932, said Court entered judgment overruling the demurrer and dismissing the petition (R. 50).

On the appeal that judgment was reversed by the judgment of the Court of Appeals of the District of Columbia. The accompanying opinion held in substance that there was inconsistency between the Commission's findings of fact and its conclusion that respondent had not been damaged as a result of violations of the Interstate Commerce Act committed by the railroads, and as no other remedy was available, mandamus would lie to compel the Commission to make the award (R. 53–59).

ASSIGNMENT OF ERRORS

The Court of Appeals of the District erred in holding that mandamus was appropriate to compel the Commission to make an award of reparation in this case, contrary to its own judgment and discretion.

SUMMARY OF THE ARGUMENT

1. The Commission found that the rates were not unreasonable but that they caused undue pref-

erence and prejudice; and, accordingly, its regulatory order was directed to the removal of said undue preference and prejudice. Its determination in respect of the reparation asked for, that the record would not support an award on the undue prejudice found to exist, was exercise of judgment and discretion which cannot be controlled by mandamus. *Donner Steel Co.* v. *I.C.C.,* 285 Fed. 955.

The Commission's preliminary findings did not, as held by the lower court, include the finding of the fact of *damage* resulting from the discrimination and the amount of the loss, or otherwise so exhaust all its jurisdiction and discretion that the court could issue the writ "as one to require the Commission to perform a specific duty prescribed by the act." The finding that complainant was compelled to base its price on the group *rates* and absorb the charges of the S.C. & M. was not a finding that mills in its group, or groups, or even in the groups in the same general territory, controlled complainant's prices at the many markets in eastern trunk line and central territories, New England and eastern Canada. As to competition at said markets, the Commission found "that complainant's competition is mainly with mills in the same general territory." The obvious fact that complainant's "lumber is sold in competition with that produced throughout the country" was also covered by express finding (R. 30).

Unlike case where an unreasonable rate has been exacted and "the carrier ought not to be allowed to retain his illegal profit", the case was one "where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less * * *. There the damage depends upon remoter considerations." *So. Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U.S. 531, 534. Damage does not necessarily follow from the rate discrimination; nor even were the fact of damage established as a "certain result of the wrong" (Cf. *Story Parchment Co.* v. *Patterson Co.*, 282 U.S. 555, 562), is its amount necessarily measured by the difference in rates. *Penna. R.R.* v. *International Coal Co.*, 230 U.S. 184.

2. In reaching its determination that the record would not support an award of damage, the Commission was guided by principles applied by the courts as to the proof necessary to sustain recovery. If, in any way, it gave erroneous effect to said principles, mandamus is not a proper remedy to correct the error. *I.C.C.* v. *Waste Merchants Assn.*, 260 U.S. 32.

ARGUMENT

Mandamus is not an appropriate remedy in this case

(1) Mandamus cannot be had to compel a particular exercise of judgment or discretion.

In *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, the Supreme Court said:

> The principles of law relating to the remedy by *mandamus* are well settled.
>
> It lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion.
>
> It lies, also, where the exercise of judgment and discretion are involved and the officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal.
>
> It is applicable only in these two classes of cases. It cannot be made to perform the functions of a writ of error. (Id. 533–534).

It has been settled by this Court that the determination by the Commission as to whether or not a shipper has been wronged by the exaction of an unreasonable or discriminatory rate involves the exercise of judgment or discretion. In the case of *Great Northern Railway Company* v. *Merchants Elevator Company,* 259 U.S. 285, at page 291, the Court said:

> Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule, or practice shall be

> deemed reasonable for the future is a legislative or administrative function. *To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters;* and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. * * * (Italics supplied.)

Before a party can recover damages for a violation of the Interstate Commerce Act, there must be a clear showing of injury; it is not sufficient to show the wrong of the carrier, but it must be likewise demonstrated that such wrong has resulted in injury to the person seeking damages. This has been held by this Court in *Parsons* v. *Chicago & N. W. Ry. Co.*, 167 U.S. 447, 460, where it is said:

> * * * The only right of recovery given by the interstate commerce act to the individual is to the "person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act". So, before

> any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities. * * *.

Accordingly, whether in respect of the fact of damage, or its amount, determination of the question involves exercise of judgment and discretion. The lower court does not dispute this. Its decision that mandamus would lie to require the Commission to award damage, which the Commission had determined the record would not support (R. 36), rests on its view that said determination was a mere conclusion contrary to the Commission's own findings of fact; that the Commission had by its earlier findings exercised all its jurisdiction and exhausted all its discretion, including the making of the finding of the fact of damage and the fact of loss sustained thereby; and that, thus, the writ was "one to require the Commission to perform a specific duty prescribed by the Act" (R. 56). Further explaining this view the Court later said (R. 58):

> In this case the commission has found, as we have pointed out, unlawfulness of rate, injury, and damage, and the amount of loss. In these circumstances nothing more is

> necessary than the mere matter of the multiplication of the number of cars by the ascertained overpayment per car. If there is any other element entering into the computation of damages which might change this result, there is nothing in the commission's findings of facts to indicate it. The statement is made by the commission that appellant's prices are fixed by the prices of its competitors who enjoy the $15 preferential. If this were not true, or if appellant's prices were only partially so controlled, a different case might be made, and in such circumstances appellant's loss would be computed on a different basis.

But the Commission did not find either the fact of damage or the amount of loss. Nor did it find that respondent's prices were fixed by the prices of "its competitors who enjoy the $15 preferential." This is shown by the court's own statement of the Commission's findings, earlier summarized in its opinion as follows (R. 54):

> The commission found that appellant's competitors, having their mills within the Allingdale group and located on branch lines of the B. & O., paid only the Allingdale rate, which was $15 per car less than the charges exacted of appellant for the service from its mills to the same destinations. The result of this was that appellant was required to pay $15 more for each car of lumber shipped than its competitors. The commission likewise found that appellant's prices were all

> quoted f.o.b. Allingdale; that it sold its lumber in competition with that produced in the same general territory, and was forced to base its price on the group rates and to absorb the $15 per car charge of the Strouds Creek road. In these circumstances the Commission found that the through interstate rates exacted of appellant "were, are, and for the future will be unduly prejudicial to complainant and unduly preferential to its competitors in the same general origin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, West Virginia," and consequently entered an order requiring the railroads participating in transportation of appellant's lumber within the United States to cease and desist, etc. But the commission also found that "the record will not support an award of reparation based on the undue prejudice found to exist." The conclusion last stated is the bone of contention.

The Court appears to have mistaken the purport of the Commission's findings, thus abstracted by it, in at least three important particulars:

1. In repeatedly stating that the Commission found the fact of damage in face of the Commission's express finding that the record would not support an award, the Court may have considered that the finding of the fact of damage was comprehended in the Commission's finding of undue preju-

dice, which it sets out in quotations, namely, the finding that the rates "were, are, and for the future will be, unduly prejudicial to complainant." Findings of the Commission are frequently worded in the past, although only made in support of an order establishing rates for the future. Certainly such wording is not confined to cases where reparation is asked for and granted. The factual evidence on which the Commission establishes rates necessarily relates to the past, and if the fact of damage followed, as, of course, from the fact of undue prejudice in the past, there would be no need for proof of damage other than the unlawful rate relation.

2. The Court's statement that the Commission had found "the amount of loss" is plainly based on the fact that the rates were found to be unduly prejudicial to the extent that they exceeded the rates from the group which includes Allingdale, namely, the sum of $15, charged by the S.C. & M. to Allingdale, which constituted the difference between the rates paid by respondent and the rates of those of its competitors in the Allingdale group. But the rates from points on the S.C. & M., including said short line's $15 charge, are expressly found not to have been unreasonable (R. 36). In fact, said rates do not appear to have been attacked as unreasonable *per se,* but only as relatively high by comparison with the group rates (R. 33). It is plain that "where a party who has paid only a reasonable rate sues on a discrimination because some

other has paid less" (*So. Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U.S. 531, 534) the rate difference does not necessarily measure his damage, if any. *P.R.R.* v. *International Coal Co.*, 230 U.S. 184.

3. The lower court has taken the Commission's finding that respondent "was forced to base its price on the group rates and to absorb the $15 per car charge of the" S.C. & M. (R. 54) to read that respondent "was forced to base its price on its competitors' *price* and itself absorb the $15 unlawful charge" (R. 55). On this reading of the Commission's finding the lower court apparently bases its later statement, above given, namely, that:

> The statement is made by the Commission that appellant's prices are fixed by the prices of its competitors who enjoy the $15 preferential. If this were not true, or if appellant's prices were only partially so controlled a different case might be made, and in such circumstances appellant's loss would be computed on a different basis" (R. 58).

There seems to be no reason for reading said finding of the Commission to mean that respondents' prices were fixed, or controlled, by the prices of its competitors, either in the Allingdale group, or in the other groups in the general territory, from which lower rates obtained (R. 36–37). In respect of competition the Commission found that respondents'

> lumber is sold in competition with that produced throughout the country and especially

that produced in the same general territory (R. 30).

The Commission's report next reads:

> The principal competitors are said to be mills at Gauley Mills, Fenwick, Midvale, Suncrest, and Pickens, W.Va., which produce and manufacture the same grades of lumber as complainant and are located in the same general territory. These points are all on the line of the B. & O., and the district or group rates apply therefrom (R. 30).

The Commission's last findings as to competition was made when comparing the case with the *Swift Lumber Co. case, supra,* the facts of which it said were very similar. It reads (R. 35):

> The Swift Lumber Company's competition in that case was not shown to be with any particular mills and was not confined to those in the blanket territory. In the present case complainant's competition is mainly with mills in the same general territory, which includes the other groups where the junction point of group rates apply from points on certain short-line connections of the B. & O. (R. 35–36).

The above cannot be taken to mean more than it says, namely, that respondent's "competition is *mainly* with mills in the same *general territory.*" Since the Commission made the express finding that respondent's lumber was sold in competition with that produced throughout the country and, in view of the fact that the lower court attributes

conflict between the Commission's earlier statements of fact and its ultimate finding that the record would not support damage, it seems proper to again emphasize that respondent's lumber was sold in many markets in eastern trunk-line and central territories, in New England, and eastern Canada (R. 29), at which markets it is obvious that it met competition other than from its competitors in the Allingdale groups or in the other groups in the same general territory.

Further, in view of the conflict attributed by the lower court between the Commission's finding that the record would not support an award of reparation and its earlier finding of fact, it seems clear that, in the absence of that record, the alleged conflict should not be resolved against said determination of the Commission arrived at on that record. Compare *Spiller* v. *A. T. & S. F. Ry.*, 253 U.S. 117, 125.

It is believed that the lower court's misconception of the Commission's findings was largely due to its apparent view that damage to the respondent followed, as of course, when it was determined that it had been discriminated against to the extent of a named rate difference. This conflicts with the decision of this Court in *Pennsylvania R.R. Co.* v. *International Coal Co.*, 230 U.S. 184.

In that case the coal company proved that during the period of time extending from April 1899 to April 1901, it and its competitors paid to the car-

rier the same rates for the transportation of coal from points in the Clearfield district, Pennsylvania, to certain destination points, and that, while the carrier afterwards refunded to said competitors certain percentages of the rates paid by them, it refused to make like refunds to the coal company. The latter contended that it was entitled to recover the amount of the refunds the carrier had refused to pay, and this contention was upheld by the Circuit Court and the Circuit Court of Appeals. In reversing the judgment of the latter court, this Court said:

> The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record (Id. 204).

After showing the results which would follow from the application of the rule contended for by the coal company, the Court used the following language:

To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evildoers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment, and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained—whatever they might be and whether greater or less than the rate of rebate paid (Id. 206).

* * * * *

> In view of the express provisions of Section 8 of the Act to Regulate Commerce, it was error to refuse to charge that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers." The judgment of the Circuit Court of Appeals is reversed and the case remanded to the District Court, with directions to grant a new trial (Id. 207–208).

The lower court's opinion contains no discussion of the *International Coal case*. While said case involved a particuluar kind of discrimination, namely, departure from published rates through rebates to preferred shippers, which is rigidly prohibited and made a criminal offense, nevertheless, its rule in respect of certainty of proof of the fact of damage and its statements as to the measure of the amount of damage are patently applicable to the instant case. The court failed to distinguish between a case involving unreasonableness of rates where

> the carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. (*So. Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U.S. 531, 534)

and a case where the fact of damage depends upon remoter considerations. The distinction is pointed

out by this court in the *Darnell-Taenzer case, supra,* where it is said:

> The cases like *Pennsylvania R.R. Co.* v. *International Coal Mining Co.,* 230 U.S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss.

In its early decisions, or some of them, the Commission proceeded upon the premise that its power was to award so-called "rate damage", that is, damage measured by the difference in rates in a discrimination case, and damage measured by the amount the rates exceeded a reasonable maximum in a section 1 case; and that it was without power to make awards of general or "legal" damage. *Joynes* v. *Pennsylvania R.R.,* 17 I.C.C. 361; *L. & N. R. R.* v. *Ohio Valley Tie Co.,* 242 U.S. 288. But following the decision in the *International Coal Case, supra,* the Commission has consistently held [2] that "proof of damage in undue prejudice cases

[2] See, among other cases, *Anadarko Cotton Oil Co.* v. *A., T. & S. Fe Ry. Co.,* 20 I.C.C. 43, 49; *Blackman & Griffin Co.* v. *A. C. & Y. Ry. Co.,* 49 I.C.C. 649, 655; *Knoxville Iron Co.* v. *L. & N. R.R. Co.,* 128 I.C.C. 513, 514; *Gallagher* v. *Penna.R.R.Co.,* 160 I.C.C. 563, 569; *Topeka Chamber of Commerce* v. *A., T. & S. Fe Ry. Co.,* 178 I.C.C. 725, 728.

must be by such evidentiary facts as would be required to sustain such a recovery before a court of law" (*Wright Lumber Co.* v. *A.A.R.R.Co.,* 112 I.C.C. 337, 339, 340).

That is not to say that in a section 1 case, involving rate unreasonableness, a Commission award could not include general damage as well as "rate damage." *L. & N. R.R.* v. *Ohio Valley Tie Co., supra.* But, even where it exists, such damage is remote from the wrong; whereas when rates have been found unreasonable to the extent that they exceed a named maximum, an amount certain has been established which, as retained by the carrier and withheld from the shipper, is an illegal profit to the one and an unlawful charge against the other. In preference to this the shipper, who suffered the loss *at least when he paid,* is allowed to recover, even though his damage, or part thereof, may have been passed on to consumers. On the other hand "where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less", it will be seen that, even though the difference in rates may be determined with certainty, it does not necessarily follow that damage in that, or in any, amount has resulted from the wrong of the carrier. It must be constantly kept in mind that the wrong of the carrier is not that it charged an unreasonable rate but is that it failed to maintain equality of rates and,

therefore, that any damage to the suing party is not that the carrier has exacted, and is withholding from him, an illegal profit, but must be shown to have resulted from the unlawful relation that obtained, the one rate with the other.

Proof of such unlawful relation, that is, of undue preference and prejudice, is not of itself sufficient to establish damage, which is not presumed but must be proved; and even where the fact of damage is shown, the amount is not necessarily measured by the difference in the rates, but it may be greater or less or the same as said rate difference. *Mfrs. & Merchants Asso.* v. *A.&A.R.R.*, 37 I.C.C. 350, 351. Nothing in the Act to Regulate Commerce warrants a presumption of damage. *Oregon Fruit Co.* v. *Southern Pacific Co.*, 50 I.C.C. 719, 722. Damage must be proved to have resulted from the wrong that was done, namely, from the fact that, although the party was charged only a reasonable rate, the carrier accorded another party a lesser rate for like transportation. In making such proof competition and control of the market are important factors. It is true that even though the parties were not engaged in competitive business, the one would be at a disadvantage with the other simply as a user of transportation; and under some circumstances such disadvantage could, too, be found to be "unjust" and "undue", at least as support for an order legislative in nature, that is, an order operating *in*

futuro. Cf. *L. & N. R.R.* v. *U.S.* (*Private Passenger Car case*), 282 U.S. 740, 749. And, where the parties were in fact engaged in competitive business, there is added support for an order to desist from the discrimination, because, among other things, a party, even though paying only a reasonable rate may by reason of his transportation disadvantage in relation to the rate of a competitor, be subjected to damage. But, as aforesaid, to warrant an award of damage, it must be shown to have resulted.

The Commission has held that "lost sales", when attributable to such a rate disadvantage, constitutes a sufficient showing of damage.[3] It has held, however, that the mere showing of "loss of profits",[4]

[3] *Coal Switching Reparation Cases at Chicago*, 36 I.C.C. 226, 231, 232; *H-O Cereal Co.* v. *A., T. & S. Fe Ry. Co.*, 100 I.C.C. 297, 299; *Knoxville Iron Co.* v. *L. & N. R.R. Co.*, 128 I.C.C. 513, 514; *Iten Biscuit Co.* v. *C., B. & Q. R.R. Co.*, 53 I.C.C. 729, 731; *Chicago Bridge & Iron Works* v. *Director General*, 85 I.C.C. 99–100; *Koenig & Co.* v. *B. & O. R.R. Co.*, 81 I.C.C. 683, 684; *Carnegie Steel Co.* v. *Director General*, 96 I.C.C. 527, 536–537; *Hylton Flour Mills, Inc.* v. *Los Angeles & S. L. R. Co.*, 152 I.C.C. 81, 83–84.

[4] *Coal Switching Reparation Cases at Chicago*, 36 I.C.C. 226, 228; *Wharton Steel Co.* v. *Director General*, 59 I.C.C. 11, 23–24; *Standard Oil Co.* v. *Director General*, 66 I.C.C. 37, 41–42; *Brooks Coal Co.* v. *Wabash R.R. Co.*, 39 I.C.C. 426, 432; *Badger Lumber & Coal Co.* v. *A., T. & S. Fe Ry. Co.*, 136 I.C.C. 350, 352; *Carnegie Steel Co.* v. *Director General*, 96 I.C.C. 527, 536–537; *Gallagher* v. *Penna. R.R. Co.*, 160 I.C.C. 563; *Consumers Material Corp.* v. *A., T. & S. Fe Ry. Co.*, 160 I.C.C. 579, 587.

or the fact that the shipper had to "absorb"[5] certain charges, is not enough to warrant an award, even though coupled with a showing of competition in common markets.[6] These matters are material to proof of damage, but the Commission has stressed the importance of the showing that preferred competitors controlled the market, or prices in the market.[7]

In addition to the *International Coal case, supra,* this Court's decision in *Keogh* v. *C. & N. W. Ry.,* 260 U.S. 156, affords judicial guide as to the show-

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[5] *Mercantile Lumber Co.* v. *I.C.R.R. Co.*, 59 I.C.C. 128, 129; *Empress Coal Co.* v. *O.-W. R.R. & N. Co.*, 69 I.C.C. 618; *Memphis Freight Bureau* v. *C. & E. I. Ry. Co.*, 101 I.C.C. 26, 27–28; *Stauffer Chemical Co.* v. *H. & B. V. Ry. Co.*, 142 I.C.C. 327, 328; *Badger Lumber & Coal Co.* v. *A., T. & S. Fe Ry. Co.*, 136 I.C.C. 350, 352; *Chattanooga Wheelbarrow Co.* v. *N. C. & St. L. Ry. Co.*, 132 I.C.C. 713, 714; *Home Packing & Ice Co* v. *Director General*, 57 I.C.C. 691, 697; *Donner Steel Co.* v. *D. L. & W. R.R. Co.*, 57 I.C.C. 745, 751; *Consumers Material Corp.* v. *A., T. & S. Fe Ry. Co.*, 160 I.C.C. 579, 588.

[6] *Hormel & Co.* v. *C.G.W.R.R. Co.*, 56 I.C.C. 419, 425; *Donner Steel Co.* v. *D. L. & W. R.R. Co.*, 92 I.C.C. 595, 599–600; *Iten Biscuit Co.* v. *C. B. & Q. R.R. Co.*, 53 I.C.C. 729, 731; *Stauffer Chemical Co.* v. *H. & B. V. Ry. Co.*, 142 I.C.C. 327, 328; *United Iron Works* v. *Director General*, 104 I.C.C. 449, 451.

[7] *Hylton Flour Mills, Inc.* v. *L. A. & S. L. R. Co.*, 152 I.C.C. 81, 83–84; *Hormel & Co.* v. *C.G.W.R.R. Co.*, 56 I.C.C. 419, 425; *Wharton Steel Co.* v. *Director General*, 59 I.C.C. 11, 23–24; *Mercantile Lumber Co.* v. *I.C.R.R. Co.*, 59 I.C.C. 128, 129; *Koenig Co.* v. *B. & O. R.R. Co.*, 81 I.C.C. 683, 684; *United Iron Wks.* v. *D.G.*, 104 I.C.C. 449, 451; *Chattanooga Wheelbarrow Co.* v. *N. C. & St. L. Ry. Co.*, 132 I.C.C. 713, 714.

ing necessary to establish damage in a discrimination case. Said case involved damages sought under the Sherman Anti-Trust Act, but the opinion recognized that the proof required was the same as under Section 8 of the Interstate Commerce Act. At pages 164–165 it was said:

> Under Section 7 of the Anti-Trust Act, as under Section 8 of the Act to Regulate Commerce, *Pennsylvania R.R. Co.* v. *International Coal Mining Co.*, 230 U.S. 184, recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. * * *

In a footnote to the above decision the case of *Central Coal & Coke Co.* v. *Hartman* (Circ. Ct. Appeals, 8th Circ.), 111 Fed. 96, is referred to with approval. The latter decision reads at page 98:

> * * * For this reason the sufficiency of the evidence of damages to sustain the verdict will first be considered. The only damages claimed in the petition, and the only losses which the plaintiff sought to prove at the trial, were the loss of some of the expected profits of his business of buying and selling coal between January 1, 1897, and January 25, 1899. Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be

> secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered.

It is true that "there is a clear distinction between the measure of proof necessary to establish the fact" of some damage and "the measure of proof necessary to enable" the fixing of the amount. *Story Parchment Co.* v. *Patterson Co.,* 282 U.S. 555, 562. But the fact of damage must be established as a "certain result of the wrong" and, as to the amount, it would seem that in no case may damages be determined by mere speculation or guess, although "where the tort itself is of such a nature as to preclude the ascertainment of the amount with certainty" it is "enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate" (idem, pages 562, 563).

The above decisions of this Court, particularly when considered in light of the complicated facts existing in discrimination cases, show that the fact of damage and its amount necessarily depend upon the facts and circumstances of each case. The decision of the lower court in the instant case discusses *Buffalo Union Furnace Co.* v. *L. S. & M. S. Ry.,* 44 I.C.C. 267, wherein reparation was awarded upon findings which it regarded as sufficiently like those here involved as to render the issuing of an award in this case the specific duty of the Commission. There are other cases[8] wherein reparation was also granted upon findings in some particulars like the *Buffalo case.* And, as above shown, there are still other cases wherein the facts found have been in some particulars the same and reparation has been denied. But examination of the facts of those cases, even as shown by the statements thereof contained in the Commission's reports, will disclose in each case different circumstances and conditions upon which the fact of damage might depend and, therefore, requiring a particular exercise of judgment and discretion. In *Donner Steel Co.* v. *Int. Com. Comm.* (Ct. of Appeals, D.C.) 285 Fed. 955 (Certiorari denied, 270 U.S. 651), it was said at pages 958, 959:

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[8] *Buffalo Brick Co.* v. *N.W.Ry. Co.*, 129 I.C.C. 294, 295; *Badger Lbr. & Coal Co.* v. *A., T. & S. Fe Ry. Co.*, 148 I.C.C. 173, 174; *Foster Lbr. Co.* v. *V. & S. R.R. Co.*, 112 I.C.C. 651, 653–654; *Lester & Toner* v. *L.I.R.R. Co.*, 83 I.C.C. 251, 252–253.

Appellant is here attempting to require the Interstate Commerce Commission to set aside its judgment and award damages upon the facts adduced. It is not contended that the Commission was without jurisdiction to hear the complaint and make the order complained of, or that its ruling is expressly inhibited by statute; but it is urged that the Commission after finding discrimination, committed an error of law in refusing to award damages to appellant. However inequitable and inconsistent the ruling, it cannot be corrected in this proceeding. It is too well settled to require discussion that the writ of mandamus cannot be converted into a writ of error, for the purpose of reviewing errors of law committed by a tribunal whose jurisdiction to make the order of judgment complained of is conceded. *Commissioner of Patents* v. *Whiteley,* 4 Wall. 522, 18 L.Ed. 335. Nor can the writ be had to compel a particular exercise of judgment or discretion. *Riverside Oil Co.* v. *Hitchcock,* 190 U.S. 316, 23 Sup. Ct. 698, 47 L.Ed. 1074; *Hall* v. *Payne,* 254 U.S. 343, 41 Sup. Ct. 131, 65 L.Ed. 295; *Interstate Commerce Commission* v. *United States ex rel. Members of Waste Merchants' Association,* 43 Sup. Ct. 6, 67 L.Ed.—(present term) (Id. 959–959).

(2) Mandamus cannot be used as a writ of error

It has been shown that the Commission, in determining that respondent was not entitled to an award of damage, exercised a power discretionary

in character, and that mandamus, as granted by the lower court, would compel the Commission to award reparation contrary to its judgment and discretion. And that, too, without the record upon which the Commission reached its determination, or any other record, before said court. The basis upon which the court held that mandamus would lie was that the Commission's express finding that the record would not support an award of damage was in conflict with other findings and statements in its report, which latter in the court's view rendered its writ "one to require the Commission to perform a specific duty imposed by the Act." The Court held that the Commission had found the fact of damage and the amount of the loss in face of the Commission's express finding that no damage was shown, which latter the court termed a conclusion contrary to earlier facts stated by the Commission. It is inescapable that the court's action compels a particular exercise of discretion contrary to the Commission's judgment. Furthermore, the Commission has applied the principles laid down by this court as to the requisite proof to show damage, and if in any way it gave erroneous effect to said principles mandamus is not a proper remedy to correct the error.

In *Interstate Commerce Commission* v. *Waste Merchants' Association,* 260 U.S. 32, this court held that mandamus would not lie to compel the Commission to set aside its decision denying reparation

to certain shippers by certain carriers because of loading services which, it was claimed, the carrier failed to perform under its tariffs, and which the shippers were thus obliged to perform. In disposing of the case the court said, at page 34:

> We have no occasion to consider the merits of the controversy before the commission. That it did not dismiss the complaint for lack of jurisdiction is clear. It heard the case fully. It found that the rates charged were not unreasonable or discriminatory in violation of the commerce act, nor unreasonable for the service actually performed, in violation of the Federal control act. It found that the conditions complained of were an incident of the World War; that the arrangement for loading was a voluntary one beneficial to complainants' members; that there was no provision in the tariffs for allowance to shippers who load cars; and that, therefore, such allowance could not legally be made by the carriers. The commission dismissed the complaint because it held that the petitioners were not entitled to relief. *Waste Merchants' Association* v. *Director General,* 57 I.C.C. 686.
>
> Petitioners sought in the proceeding to set aside the adverse decision of the commission on the merits and to compel a decision in their favor. The Court of Appeals granted the writ. This was error. Mandamus cannot be had to compel a particular exercise of judgment or discretion, *River-*

side Oil Co. v. *Hitchcock,* 190 U.S. 316; *Ness* v. *Fisher,* 223 U.S. 683; *Hall* v. *Payne,* 254 U.S. 343; or be used as a writ of error, *Commissioner of Patents* v. *Whiteley,* 4 Wall. 522. The case at bar is not like *Interstate Commerce Commission* v. *Humboldt S.S. Co.,* 224 U.S. 474, and *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U.S. 638, where the commission had wrongly held that it did not have jurisdiction to adjudicate the controversy; nor is it like *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission,* 252 U.S. 178, where the commission wrongly refused to perform a specific peremptory duty prescribed by Congress (Id. 34–35).

For the reasons above set forth, we respectfully insist that the decision of the Court of Appeals in this case should be reversed, that of the Supreme Court of the District of Columbia reinstated, and the petition for writ of mandamus dismissed.

DANIEL W. KNOWLTON,
EDWARD M. REIDY,
For Interstate Commerce Commission,
petitioner.

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